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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. [redacted] 35

HUGH BRYSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit reversing an order of the District Court which, on petitioner's motion, had set aside a final judgment and sentence on a charge of falsely swearing, in 1951, in the affidavit then required by section 9(h) of the Taft-Hartley Act (Labor Management Relations Act of 1947; 29 USC §159), that he was not "affiliated" with the Communist Party.

The order of the District Court was based on its holding that section 9(h) was unconstitutional.

OPINIONS BELOW

The District Court wrote an opinion entitled "Order Setting Aside Conviction and Sentence," which likewise constituted its findings of fact and conclusions of law. The opinion is not reported; it is reproduced in the Appendix, *infra,* pp. iii-xx.

The opinion of the Court of Appeals has not yet been reported; it is set out in the Appendix, *infra,* pp. i-ii.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1968. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

(1) Whether petitioner is precluded, by reason of this Court's decision in *Dennis v. United States,* 384 U.S. 855, from attacking the constitutionality of section 9(h) of the Taft-Hartley Act.

(2) Whether, in the comparative light of *American Communications Assn. v. Douds,* 339 U.S. 382, and *United States v. Brown,* 381 U.S. 437, section 9(h) is constitutional.

(3) Whether the petitioner qualifies, under either 28 USC 1651 (the All Writs Section) or 28 USC 2255, for post-conviction relief.

STATUTES INVOLVED

18 USC 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 USC (1958 ed.) 159(h)), which was repealed by section 201(d) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated

with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [sections 286, 287, 1001, 1022 and 1023 of Title 18] shall be applicable in respect to such affidavits.

Section 504 of 29 USC, as amended in 1959, provided in pertinent part:

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization,***

* * *

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment***.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 1651 of 28 USC provides in pertinent part:

> (a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2255 of 28 USC provides:

> A prisoner in custody under sentence of a Court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the Court shall vacate

and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A Court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing Court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the Court which sentenced him, or that such Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, §114, 63 Stat. 105.

STATEMENT

In 1955, appellant was convicted under the general federal perjury statute (18 USC §1001) of having falsely denied, in an affidavit required to be filed by section 9 (h) of the Taft-Hartley Act (29 USCA 159 [h]), that he was then (in 1951) "affiliated" with

the Communist Party.[1] He was sentenced to five years in prison and a $10,000 fine—the maximum sentence permitted by the law. The sentence also provided that he "be further imprisoned until said fine is paid or you are otherwise discharged as provided by law". (*United States v. Bryson,* N.D., California, No. 34105; reporter's transcript of June 14, 1955, pp. 16-17).

The conviction was affirmed (238 F.2d 657, 243 F.2d 837; certiorari denied 355 U.S. 817), as was the denial by the trial judge of a subsequent motion to modify the sentence (265 F.2d 9; certiorari denied 360 U.S. 919.)

Petitioner commenced the service of his sentence in January of 1958. Nearly two years later, in December of 1959, he was released on parole. He later paid $2,000 of his fine, but $8,000 remains unpaid. He is still subject to the supervision of the Board of Parole: he is required by it to make monthly reports to the probation officer of the District Court; he cannot travel outside of California without first securing permission from that officer; he is also deprived, because of the existence of the conviction, of his right to vote and to secure a passport. (District Court's decision, Appendix, *infra,* p. iv.)

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[1]Originally the indictment was in three counts: (1) that the petitioner had falsely denied his support of an organization that believed in the forcible overthrow of the government—this was abandoned by the prosecution before trial; (2) that he falsely denied that he was a member of the Communist Party—on this, he was acquitted by the jury; (3) that he falsely denied "affiliation" with the Communist Party—on this, although the jury found him guilty, it apparently was uncertain of the meaning of the word "affiliation". (See Order of the District Court, *infra,* pp. xii-xiii.)

To facilitate understanding of the issues presented here, it is necessary to turn briefly to the history of the statute on which petitioner's conviction was based:

(1) In 1950, section 9(h) withstood an attack that it was unconstitutional as a bill of attainder and for infringing First Amendment rights (*American Communications Assn. v. Douds,* 339 U.S. 382 [1950].) Three members of the Court did not participate in the decision. The provision of the law relating to "affiliation" was upheld by four Justices, with Justice Black and Justice Frankfurter separately dissenting.[2]

(2) In 1959, section 9(h) was repealed; contemporaneously, section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 USCA 504) "was enacted to replace" it. *United States v. Brown,* 381 U.S. 437, 439 (1965).

(3) In June 1965, section 504 was held unconstitutional as a bill of attainder in an opinion written by the Chief Justice expressing the views of five members of

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[2]Justice Black deemed the statute to be a bill of attainder in its entirety. In reference to "affiliation," he wrote:

> "Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate." *(Douds, supra,* p. 452.)

Justice Frankfurter, taking note of "the dubious scope of the term 'affiliated' in the statute" *(Douds, supra,* p. 420, fn. 2), wrote as follows:

> "If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of §9(h) to be restricted to disavowal of actual membership in the Communist Party, or in an organization that is in fact a controlled cover for that Party, or of active belief, as a matter of present policy, in the overthrow of the Government of the United States by force. But what Congress has written does not permit such a gloss nor deletion of what it has written." *(Douds, supra,* 421-422.)

this Court (*United States v. Brown, supra.*) The opinion suggested (381 U.S. at 447) that *Douds* had departed from the "spirit" in which the bill of attainder clause had been "consistently interpreted," and said (381 U.S. at 460) that the Court in *Douds* had "misread" an earlier bill of attainder case. (*United States v. Lovett,* 328 U.S. 303 [1945].) The four dissenting justices in *Brown* wrote of the decision's impact on *Douds* and section 9(h) in these words:

> "It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate.
>
> *American Communication Assn. v. Douds,* 339 U.S. 382; 94 L Ed 925, 70 S Ct 674, which upheld the predecessor statute to §504 is obviously overruled. . . . Like §504, the statute there under consideration did not cover all persons who might be likely to call political strikes. . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds*". (*United States v. Brown, supra,* at 464-465.)

(4) In November 1965, this Court granted certiorari to review a decision of the Court of Appeals for the Tenth Circuit, which had affirmed a criminal conviction involving section 9(h). (*Dennis v. United States,* 382 U.S. 915.) The writ limited review to three questions, one of which read as follows:

> "Whether, in the comparative light of American Communications Ass'n. v. Douds, 339 U.S. 382 [94 L ed 925, 70 S Ct 674], and United States v. Archie Brown, 381 U.S. 437 [14 L ed 2d 484, 85 S Ct 1707], Section 9(h) of the Taft-Hartley Act is constitutional."

In June 1966, this Court reversed the criminal conviction in *Dennis,* but laid decision on the trial court's denial of a motion to make certain grand jury testimony available for pretrial examination. (*Dennis v. United States,* 384 U.S. 855.) The Court expressly declined to pass upon the constitutional attack on section 9(h) for the reason that the *Dennis* petitioners were held to lack standing to assert the challenge (*Dennis, supra,* 864-867.) While joining in the reversal, Justices Black and Douglas dissented from the Court's refusal to declare that section 9(h) was unconstitutional. (*Dennis, supra,* 875-889.)

It has been mentioned that petitioner, in the years following his release on parole in 1959, paid $2,000 of the $10,000 fine. Following this Court's decision in *Dennis, supra,* the Government caused to be issued, in the original criminal case proceedings against petitioner, a subpoena duces tecum requiring him to attend at a designated time and place for the taking of his deposition. He was subjected to a thorough and detailed examination of his assets and liabilities, income and expenses, income tax return for 1965, and the potential value of inchoate interests acquired as commissions in transactions in which he had acted as a licensed real estate salesman (Deposition of Hugh Bryson, December 16, 1966, filed in *United States v. Bryson,* N. D. California, Criminal No. 34105.) The Government later sought from him various assignments of these assets, "to be applied in satisfaction of the fine in *United States v. Bryson,* Criminal No. 34105" (letter, December 19, 1966, from Peter V. Shackter, Assistant United States Attorney, to

Richard Gladstein, attorney for petitioner), and subsequently "commenced steps toward levying" on one parcel of land (letter January 27, 1967, from Shackter to Gladstein.) In May 1967, the Government filed a civil complaint, seeking judgment for $8,000 and costs. (*United States v. Bryson,* N. D. California, Civil No. 47080.) Following petitioner's institution of the proceedings below, efforts to enforce collection were discontinued, upon a written stipulation conditioned to the outcome of the present petition.

The proceedings below were begun in 1967 when petitioner filed, in the District Court, a "Motion for Writ of Error *Coram Nobis* to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief." (*Bryson v. United States,* N. D. California, Civil No. 47127.) He alleged that the District Court had jurisdiction under 28 USC 1651 (the "All Writs Section",) as well as under 28 USC 2255.

After a hearing on the merits, the District Court ordered that his conviction and sentence be set aside, that he be released from parole, and that he be relieved of the remaining portion ($8,000) of his fine. On the Government's appeal, the Court of Appeals, in a *per curiam* opinion, reversed. It is from this decision that certiorari is now sought.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The question whether section 9(h) is constitutional was thought by this Court to be sufficiently important to warrant reconsideration of the decision in *Douds,* as shown by the grant of certiorari in *Dennis v. United States,* (382 U.S. 915.) But the question was left unanswered because this Court, on subsequent examination of the conduct of the petitioners there, concluded that such conduct was so conspiratorial and fraudulent that it operated to deprive them of standing to be heard on the issue of constitutionality. (*Dennis v. United States,* 384 U.S. 855.) However, the reasons that impelled the grant of certiorari as to that issue continue to possess vitality. The action taken against petitioner here, to enforce payment of an $8,000 balance of the fine, and the maintenance of parole supervision over him, are proof of that. Additionally, he lives under the threat of that portion of his sentence which provides that he "be further imprisoned until said fine is paid or you are otherwise discharged as provided by law." Unless, then, it can be said that factual considerations are present here that are similar to those which disqualified the *Dennis* defendants, the question of the validity of section 9(h) ought surely to be resolved.

2. In truth, there are no such similar facts. Unlike the defendants in *Dennis,* the petitioner here has engaged in no such course of conduct as would justify the conclusion that he had forfeited all right to challenge the constitutionality of section 9(h). In *Dennis,* it was the "conspiracy, cynical and fraudulent"—a "conspiracy by means of falsehood and deceit"—that

was held to preclude decision on the merits of the question certified. (*Dennis, supra,* at 865, 866.) "Because the claimed invalidity of §9(h) would be no defense to the crime of conspiracy charged in this indictment, we find it unnecessary to reconsider Douds." (Ibid, 867.) The repeated emphasis on what this Court characterized as a "conspiratorial program" (ibid at 860) and "a voluntary, deliberate and calculated course of fraud and deceit" (ibid at 867) made plain that it was not the untruthfulness of the affidavits themselves that barred the *Dennis* defendants from securing a decision on the question of constitutionality, but rather the additional and overbearing factor of conspiracy.

> "But the essence of their alleged conduct was not merely the individual filing of false affidavits. It was also the alleged concert of action—the common decision and common activity for a common purpose. The conspiracy was not peripheral or incidental. It lay at the core of the alleged offense. It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge." (Ibid at 860.)

Clearly, this Court did not hold that the mere fact of conviction for false swearing automatically disqualifies the person convicted, regardless of any and all conceivable circumstances, from ever asserting the unconstitutionality of the statute on which his prosecution was founded.[3]

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[3]The decision won the concurrence of seven justices. We assume, therefore, that if the mere fact that the *Dennis* defendants had been convicted of false swearing were thought to be in itself enough to deprive them of standing to attack the constitutionality of section 9(h), this Court would not have granted the writ as to that question.

The Court of Appeals said its holding was "compelled" by *Dennis,* "because there are no significant differences between *Bryson* and *Dennis.*" (Appendix, *infra,* p. ii.) To reach this conclusion, that Court disregarded fundamental differentiating factors that the District Judge considered, rightly we submit, to be of the very essence. Here, there was neither a conspiracy nor fraud, alleged or found. Accused initially of a false denial that he supported an organization that believed, to his knowledge, in the violent overthrow of the Government, the petitioner was never brought to trial on that charge, the Government deciding instead to abandon the claim altogether, obviously for lack of evidence to support the accusation. Obliged to stand trial on the charge of falsely denying membership in the Communist Party, the petitioner succeeded in establishing his innocence and was acquitted of the charge. What finally emerged was a verdict that he had lied in denying "affiliation" with the Communist Party. This verdict, reached as it was in the face of the petitioner's denial of "affiliation," in the face of proof that he was acting upon legal advice concerning the meaning of the term "affiliation" when he filed the offending affidavit, and with neither evidence offered at trial nor claim asserted that petitioner's conduct was connected with any intention or purpose of accomplishing any ultimate evil condemned by this or any other statute, and reached by a jury whose members gave evidence of their own uncertainty of the meaning of "affiliation," amounted to a verdict of guilt by association in the starkest sense of that term.

The Court of Appeals, we think, misread this Court's opinion in *Dennis* in holding, as it did, that scope of the rule there applied was such as to foreclose a person in the position of the petitioner here.[4]

3. Even if it were thought that the facts which so dramatically distinguish petitioner and his conduct from the actions of the *Dennis* defendants nevertheless fail, as a matter of law, to warrant different treatment on direct appeal from a criminal conviction, the decision in *Dennis* is not authority for what the Court of Appeals has done here. For here the peti-

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[4]This Court considered it relevant to the question of standing that the *Dennis* defendants had shown a concerted, contemptuous disposition toward law-abidingness; for example, that they agreed "nominally to resign from the Communist Party," one of them also making "a public announcement of his resignation," but in reality all of them preserving their secret membership. *(Dennis, supra,* 859.)

The record of petitioner is in sharp contrast. In ordering a reduction in the amount of bail set after petitioner's conviction, Chief Judge Denman wrote for the Court of Appeals as follows:

> "It appears that Bryson has no prior record of convictions of any offenses, felony or misdemeanor. For many years of his life he was an American merchant seaman, subject to the jurisdiction of the United States Coast Guard; at no time was he ever charged or convicted of any violation of the rules or regulations of the United States Coast Guard. In all respects whatsoever, save and except for the conviction hereinabove mentioned, Bryson's record of conduct has been and is without blemish.
>
> ********
>
> "Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person, such elements in his character being required to be considered by the last phrase of 46(c), 'the character of the defendant.'" *(Bryson v. United States,* 223 F.2d 775 at 777 [1955].)

Mention was made in the Statement, *supra,* that petitioner is licensed to handle real estate transactions. California requires a licensee to establish his "honesty, truthfulness, and good reputation." (Business and Professions Code, §§ 10151, 10152.)

tioner does not challenge section 9(h) in order to obtain a new trial, or to secure reversal of a judgment on appeal. The sentence has been imposed; most of it has been served;[5] and what remains of it, together with the stigma of the conviction, is what he seeks to remove. His resort to statutory remedies that provide for post-conviction relief (28 USC § 1651 and § 2255) is not properly subject to considerations whose relevance surely ended when he completed his term in prison, if not indeed when he had exhausted all appeals from the judgment in the main trial. The statutory remedies invoked here, which authorize collateral attack after conviction, were not, and could not have been, involved in *Dennis*.

Nothing in this Court's opinion in *Dennis*, we submit, supports a denial of those remedies (§§ 1651 and 2255) to petitioner here—remedies that this Court had no occasion to consider in that case. It is one thing to say that a congressional enactment (section 9(h)) will be shielded from attack because the challenger, by reason of deceitful or fraudulent conduct, is estopped under a court-made rule (originating in equity cases) that affects his standing. It is quite another to say that falsehood operates to deprive him of rights created by congressional enactments (§§ 1651 and 2255) that evince no intent to distinguish between crimes on the basis of false statements. Sec-

[5]We say "most" because, despite petitioner's incarceration for 23 months and his subsequent satisfactory conduct during the lengthy period of parole (that would ordinarily have expired long ago), he continues to be subject to supervision and to the threat that he "be further imprisoned until said fine is paid or you are otherwise discharged as provided by law."

tions 1651 and 2255 are written in terms so general and all-inclusive as to repel the supposition that, while post-conviction relief is available where the offense is murder or bank robbery or violation of the narcotics laws, an opposite rule governs convictions involving fraud, dishonesty, or the like. If the fact of conviction, without more, were to be dispositive here, then sections 1651 and 2255 would never be available to any defendant whose crime consisted of making unbelieved assertions, despite his denial of guilt. In effect, a large body of criminal defendants would discriminatorily be excluded from statutory remedies designed to make possible the correction of a miscarriage of justice. Congress has not so legislated.

4. Because the Court of Appeals did not distinguish between direct appeals and post-conviction proceedings, the holding below fails to give proper effect to applicable decisions of this Court as to the nature and scope of the relief available under sections 1651 and 2255.[6] The power to grant such relief has been likened to the power to issue writs of habeas corpus (*Hill v. United States*, 368 U.S. 424, 427; *Sanders v. United States*, 373 U.S. 1, 13), whose exercise has been called "plenary". (*Townsend v. Sain*, 372 U.S. 293, 312.) Claims that would not be heard on direct review, such as those where a defendant is guilty of procedural default or has otherwise forfeited his right to appellate redress, are not subject in post-conviction

[6]The District Court found it unnecessary to pass on this aspect, inasmuch as it concluded that *Dennis* did not strip petitioner of standing to challenge the constitutionality of section 9(h). (Appendix, *infra*, pp. xi-xiv.)

proceedings to fettering rules whose function is that of limiting appellate review. (*Fay v. Noia,* 372 U.S. 391.) Accordingly, the holding of the Court of Appeals here cannot be squared with the decisions of this Court elaborating the broad power of federal district courts, in cases such as this, to determine the facts and dispose of the matter as law and justice require.

We have found no case decided under the post-conviction statutes that would support the application of what amounts to an estoppel deriving solely from the presence of falsehood, deceit, or the like, and the decisions most apposite would appear to support our contention here. Thus, the fact that the offense was mail fraud did not prevent a disposition on the merits under section 2255 in *Kloyan v. United States,* 349 F. 2d 291. (CA 5, 1965; certiorari denied, 384 U.S. 913.) The same is true where the charge was extortion. (*Stirone v. United States,* 341 F.2d 253 [CA 3, 1964], certiorari denied, 381 U.S. 902.) Even the fact that the defendant had been convicted of a conspiracy was not held to present a barrier to his right to seek post-conviction relief in *United States v. Sobell,* 314 F.2d 314. CA 2, 1963.) *Accord: Kuhl v. United States,* 370 F.2d 20 (CA 9, 1966), where the conviction was for conspiracy and counterfeiting.

The result reached by the Court of Appeals would also appear to be in conflict with other decisions construing statutes involving the filing of false affidavits. Section 1001, the statute under which petitioner was prosecuted, proscribes false statements "in any matter within the jurisdiction of any department or agency

of the United States. . . ." Of this language, the District Judge wrote as follows:

> "As that phrase has been consistently construed, petitioner committed no offense because §9(h) was unconstitutional. Hence, no government agency was authorized to inquire into petitioner's political beliefs, membership or affiliation. Only the 'authorized functions' of government were intended to be protected, *United States v. Gilliland*, 312 U.S. 86, 93 (1941). The Ninth Circuit has similarly held: 'A false statement in a matter within the jurisdiction of a department or agency within the meaning of 18 U.S.C.A. § 1001 if it relates to a matter as to which the Department had the power to act.' *Ogden v. United States*, 303 F. 2d 724, 743 (9th Cir. 1962), and in *Pitts v. United States*, 263 F. 2d 353, 358 (9 Cir. 1959), the court said 'It is clear that the congressional intent in using the broad language found in 18 U.S.C. § 1001 . . . was to protect the authorized functions of governmental departments and agencies. . . .'" (Appendix, *infra*, p. xviii.)[7]

All that was here required, then, to support the order of the District Court was that the petitioner be found to have been convicted under an unconstitutional statute, and that he presently suffers substantive restraints in consequence thereof.

5. That the petitioner here is "in custody" within the meaning of section 2255, is abundantly clear. The

[7]As pointed out by the District Judge, cases reaching the conclusion that non-communist affidavits were within the jurisdiction of the United States are inapposite, as they were decided prior to this Court's decisions in *United States v. Brown, supra; Elfbrandt v. Russell*, 384 U.S. 11, and *Keyishian v. Board of Regents*, 385 U.S. 589, and assumed the constitutionality of section 9(h).

restraints on his liberty which we have enumerated in the Statement, *supra,* substantially parallel, in fact exceed, those which this Court found adequate to establish custody under a like statute (18 USC 2241) dealing with convictions under state law. (*Jones v. Cunningham,* 371 U.S. 236; *Carafas v. LaVallee,* 391 U.S. 234.) The elimination of such restraints may also be ordered under the power granted in section 1651. (*United States v. Morgan,* 346 U.S. 502; *United States v. Hayman,* 342 U.S. 205.)

6. We reach, then, the issue that lies at the core of the case, i.e., the question of whether section 9(h) offends the Bill of Attainder and First Amendment provisions of the Constitution. We submit that it does.

In *Brown,* this Court held that section 504 was invalid as a bill of attainder. As we have earlier noted, the dissenting justices were clear that the decision "obviously overruled" Douds, which had upheld 9(h) against a constitutional attack on this ground.

In *Brown,* this Court said:

> "It is of course true that § 504 does not contain the words 'Archie Brown,' and that it inflicts its deprivation upon more than three people.[8] However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name. . . . We cannot agree that the fact that § 504

[8]The reference was to *United States v. Lovett,* 328 U.S. 303.

> inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder." (381 U.S. at 461.)

And here the District Court said, speaking specifically of 9(h):

> "Section 9(h) applied to the most docile communist even though he held no illegal aims. No judicial trial permitted a member or affiliate to show that *he* was not a threat to the national economy. He was automatically swept within the legislative class and punished by administrative sanctions. That is the evil of a bill of attainder. That was the evil of § 9(h)." (District Court's Opinion, Appendix, *infra*, p. xvi.)

In addition, section 9(h) is invalid as a violation of the First Amendment. The District Judge observed:

> *"Doud's* holding that the oath did not violate the first amendment has similarly been undermined by subsequent cases. Section 9(h) applied to members or persons affiliated with the Communist Party. To question one merely about his membership or affiliation violates the first amendment. *E.g., Keyishian v. Board of Regents,* 385 U.S. 589 (1967); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Scales v. United States,* 367 U.S. 203 (1961); *Herndon v. Lowry,* 301 U.S. 242 (1937); *DeJong v. Oregon,* 299 U.S. 353 (1937); *Hurwitz v. Directors Guild of America, Inc.,* 364 F. 2d 67, 70-76 (2d Cir. 1966). To state the facts of each case just cited is unnecessary. They all teach the

same elemental proposition essential to a free democracy. Membership alone in a political party is constitutionally not a fact which can be legitimately proscribed. More than membership is required. 'Specific intent' is required—a specific intent or belief in the illegal purposes of the group. Knowledge of the group's aims is not alone sufficient. Membership or less was deemed enough for a conviction in petitioner's case. 243 F. 2d at 839; 238 F. 2d at 663." (District Court's Opinion, Appendix, *infra*, pp. xvi-xvii.)

In the year since the District Court rendered decision below, this Court has twice taken the opportunity to reaffirm the principles on which the District Court rellied. In *United States v. Robel,* 389 U.S. 258, this Court said:

"When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See Schneider v. State, 308 US 147, 161 (1939)." (389 US at 264.)

And in *Schneider v. Smith,* 390 U.S. 17, the Court said:

"We are loath to conclude that Congress, in its grant of authority to the President to 'safeguard' vessels and waterfront facilities from 'sabottage or other subversive acts,' undertook to reach into the First Amendment area. The provision of the Act in question, 50 USC § 191(b), speaks only in terms of actions, not ideas or beliefs or reading habits or social, educational, or political associations." (390 U.S. at 25.)

Section 9(h) was aptly described by Justice Black, in the opinion he wrote in *Dennis,* as a "constitutionally doubly prohibited freedom-destroying, legislative bill of attainder." (*Dennis,* supra, p. 881.)

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certoirari should be granted, that the decision of the Court of Appeals should be reversed, and that the judgment of the District Court be affirmed.

Dated, San Francisco, California,
January 10, 1969.

Respectfully submitted,
RICHARD GLADSTEIN,
NORMAN LEONARD,
Attorneys for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

United States of America,	Appellant,	No. 22,474
vs.		
Hugh Bryson,	Appellee.	

[November 5, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, MADDEN and HUFSTEDLER, Circuit Judges

PER CURIAM:

The Government appeals from an order of the District Court granting appellee's motion to vacate and set aside a judgment of conviction of violation of 18 U.S.C.A. § 1001, the general federal perjury statute. A jury found appellee, Bryson, guilty of filing an affidavit with the National Labor Relations Board falsely alleging that he was not affiliated with the Communist Party. Bryson filed the affidavit with the Board pursuant to former § 9(h) of the Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 141,

159(h). Section 9(h) prevented a union from using services of the Board unless and until each of the union's officers had filed his affidavit that he was neither a member of nor affiliated with the Communist Party. During his trial Bryson attacked the constitutionality of § 9(h). The attack failed, and his conviction was affirmed on appeal. *Bryson v. United States,* 9 Cir., 1956, 238 F.2d 657, rehearing denied, 1957, 243 F.2d 837, cert. denied, 1957, 355 U.S. 817. The constitutionality of § 9(h) had been specifically upheld in *American Communications Ass'n v. Douds,* 1950, 339 U.S. 382.

In obtaining the order from which this appeal is taken, Bryson successfully contended in the District Court that his conviction should be vacated because § 9(h) was unconstitutional. We hold that Bryson had no standing to attack the constitutionality of § 9(h). The holding is compelled by *Dennis v. United States,* 1966, 384 U.S. 855, because there are no significant differences between *Bryson* and *Dennis.* Bryson's inability to reach the constitutional issue defeats his attack on the validity of the conviction and renders unnecessary our discussion of the remaining contentions of the parties.

The order is reversed.

United States District Court
for the Northern District of California

No. 47,127

Hugh Bryson,
Petitioner,
vs.
United States of America,
Respondent.

ORDER SETTING ASIDE CONVICTION AND SENTENCE

Petitioner, Hugh Bryson, moves to vacate and set aside what remains of his sentence for perjury. He makes his motions under 28 U.S.C. §§ 1651(a) and 2255 (1964). This court has heard oral argument from each party.

Bryson was tried for violating 18 U.S.C. § 1001 (1964), the general federal perjury statute. After seeking legal advice, Bryson had completed the non-communist affidavit then required by § 9(h) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 159, a section which required affidavits of union officers before the union could use the facilities and services of the National Labor Relations Board. Bryson was convicted of falsely swearing that he was not "affiliated" with the Communist Party. At the trial, he unsuccessfully challenged the oath requirement as

being unconstitutional and was sentenced to five years in prison and was fined $10,000, the maximum sentence provided for by § 1001.

The conviction was affirmed on appeal, *Bryson v. United States,* 238 F. 2d 657 (9th Cir. 1956), *rehearing denied,* 243 F. 2d 837 (9th Cir. 1957), *cert. denied,* 355 U.S. 817 (1957). Bryson subsequently moved to have his sentence reduced in accordance with Fed. R. Crim. P. 35. The motion was denied and an appeal dismissed, *Bryson v. United States,* 265 F. 2d 9 (9th (Cir. 1959), *cert. denied,* 360 U.S. 919 (1959).

Petitioner is presently on parole and a substantial part of his fine ($8,000) remains unpaid. Consequently, his parolee status continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote.

Petitioner argues: (1) Section 9(h) was unconstitutional at the time of his trial and therefore the trial court lacked jurisdiction to try him or to impose any punishment, and therefore his sentence should be set aside; (2) the sentence imposed was too severe and should be reduced; (3) the doctrine of "abatement" is applicable and his conviction should be set aside.

Respondent contends: (1) this court lacks jurisdiction to consider the merits of petitioner's claims because he is not in "custody" within the meaning of 28 U.S.C. § 2255 (1964); (2) the motion is without merit; (3) petitioner lacks standing.

The issues, then, are six: (1) is petitioner's status as a parolee, with a partially unpaid fine owing, suffi-

cient to confer jurisdiction upon this court? (2) is "abatement" applicable to the facts of this case? (3) was the sentence too severe and may it now be reduced? (4) does petitioner have standing to allege the unconstitutionality of § 9(h)? (5) if so, was § 9(h) unconstitutional? (6) if so, should the relief prayed for be granted?

(1) *Jurisdiction*

Petitioner contends that his motion is authorized by either 28 U.S.C. § 1651(a) (the "All Writs" statute), as being for relief in the nature of a writ of error *coram nobis,* or 28 U.S.C. § 2255, the statutory motion available to prisoners in federal custody in lieu of the writ of habeas corpus.

Section 2255 has, as a prerequisite to its use, the requirement that the petitioner be in custody. The identical requirement is imposed upon state prisoners seeking relief via the federal writ of habeas corpus, 28 U.S.C. § 2241. The two sections, 2241 and 2255, have been similarly construed, and this court holds that custody means the same in each. *United States v. Hayman,* 342 U.S. 205 (1952) (construing § 2255 to be as broad as § 2241 to avoid the constitutional question of whether § 2255 would otherwise be an unconstitutional suspension of the writ of habeas corpus); *Matysek v. United Sates,* 339 F. 2d 389, 394 (9th Cir. 1964); *Cf., Sanders v. United States,* 371 U.S. 1 (1963); *Parker v. Ellis,* 362 U.S. 574, 575, n. 1 (1960).

The Government's contention that petitioner's status —a parolee with a partially unpaid fine owing—is not

tantamount to custody is without merit. The court finds that petitioner is in custody within the meaning of § 2255. *E.g., Jones v. Cunningham,* 371 U.S. 236 (1963) (interpreting § 2241); *Hoptowit v. United States,* 274 F. 2d 936 (9th Cir. 1960) (interpreting § 2255); *United States v. DeMario,* 246 F. Supp. 786 (E.D. Mich. 1965) (interpreting § 2255). It has been suggested that the *Jones* case is not dispositive of all parole cases because the terms and conditions may vary from case to case, and therefore that each situation must be considered independently. 51 *Calif. L. Rev.* 228, 231 (1963). The restraints on Bryson's liberty to do and go as he pleases are similar to those in *Jones,* and Bryson's duty to report monthly and duty to secure permission to travel outside the state constitute restraint sufficient to amount to custody.

Alternatively, the court holds that even if Bryson is not in custody, it may consider petitioner's motion as one for relief in the nature of error *coram nobis,* 28 U.S.C. § 1651(a). In *United States v. Morgan,* 346 U.S. 502, 505 (1954), the Supreme Court said, "federal courts should act in doing justice if the record makes plain a right to relief. . . . We therefore treat the record as adequately presenting a motion in the nature of a writ of error *coram nobis* enabling the trial court to properly exercise its jurisdiction." And at 511, "We do not think that the enactment of § 2255 is a bar to this motion. . . ." Even if custody is lacking, a motion purportedly made under § 2255 may be treated as an application for a writ of error *coram nobis. E.g., United States v. Morgan,* 346 U.S. 502 (1954) (federal sentence already fully served at time

of motion); *Migdol v. United States,* 298 F. 2d 513 (9th Cir. 1961); *Shelton v. United States,* 242 F. 2d 101 (5th Cir. 1957); *United States v. DeMario,* 246 F. Supp. 786 (E.D. Mich. 1965). The relief sought may be dispensed whether the motion is treated as being under § 2255 or § 1651(a). Harvey, *28 U.S.C. 2255: From Habeas Corpus to Coram Nobis,* 1 *Washburn L.J.* 381, 388 (1961).

The mere facts that petitioner has already appealed and that the constitutionality of § 9(h) could be raised on appeal are not dispositive of his right to press his claims in this court now. Though it is well established that § 2255 is no substitute for an appeal, the Supreme Court has recognized limited exceptional circumstances which justify the motions now made before this court. In *Sunal v. Large,* 332 U.S. 174 (1947), the Court discussed the exceptional circumstances. One is when the law has changed after the time to appeal has elapsed. 322 U.S. at 178-79, 181, 182; see also *Thornton v. United States,* 368 F. 2d 822, 825-26 (D.C. Cir. 1966). The fact that Bryson appealed should not be used to distinguish *Sunal,* for that would merely punish the astute petitioner who foresees a decisional trend. The Court in *Sunal* also stressed the difference between mere procedural or evidentiary errors and those involving constitutional rights and the basic jurisdiction of the trial court. *Cf., Fay v. Noia,* 372 U.S. 391, 424 n. 35 (1963).

The only argument mounted against the proposition that a "second chance" should be given petitioner in light of new decisions is that litigation must end sometime even if a law is later construed differently. Hun-

dreds of cases may have to be relitigated under new procedures. See *United States v. Sobell,* 314 F. 2d 314, 322 n. 6, 322-23 (2d Cir. 1963); see generally Bator, *Finality in Criminal Law and Federal Habeas Corpus . . . ,* 76 *Harv. L. Rev.* 441 (1963). But that policy is inapplicable to the case of Hugh Bryson for two reasons: First, no threat of mass relitigation exists, for § 9(h) has long ago been repealed and most sentences under § 1001 have been fully served; and second, petitioner contends that no new trial under new procedures will be necessary, but rather a decision in his favor on the merits will bar any further litigation.

Though the decisions are admittedly in conflict as to the use of collateral attack on facts such as those present here, the considerations outlined above mitigate in favor of allowing petitioner to proceed by way of collateral attack. See Bator, *Finality in Criminal Law and Federal Habeas Corpus . . . ,* 76 *Harv. L. Rev.* 441, 527 n. 220 (1963), suggesting that "an acceptable accommodation [would be] by according the district judge a large discretion to determine whether justice in the individual case would be served . . . ."

(2) *Abatement*

Petitioner contends, "The combination of repeal of Section 9(h), followed by the adoption of Section 504 [29 U.S.C. § 504] as a successor, followed thereafter by the Supreme Court's holding [*United States v. Brown,* 381 U.S. 437 (1965)] that § 504 was an unconstitutional bill of attainder, creates the foundation

for invoking the doctrine of abatement." Brief for Petitioner, p. 13. The court holds otherwise.

Petitioner relies primarily upon *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964), which held that the Civil Rights Act of 1964 had the effect of abating state sit-in convictions then on appeal, the Act having made the formerly illegal conduct lawful. But even the majority in *Hamm,* while stating that no express congressional intent is necessary to abate prior convictions, did find it necessary at least to impute to Congress an intention to abate the convictions by passage of the comprehensive scheme of legislation which was the Civil Rights Act of 1964. 379 U.S. at 313.

Section 9(h) required that before a union could avail itself of the services of the National Labor Relations Board, the officers of the union had to file the so-called non-communist affidavit. Section 504 made it a crime for union officers to be communists. Both sections had a similar objective—to reduce the threat of political strikes by making it "unpleasant" for communists to be union officers. Section 504 was not inconsistent with § 9(h) as the Civil Rights Act of 1964 was with the law of several states before its passage. To impute to Congress an intention to abate perjury convictions that had been secured while § 9(h) was in force by the passage of § 504 would be to stretch statutory construction to the breaking point.

Also, the court is not unmindful of 1 U.S.C. § 109, which provides that the repeal of a statute shall not

be deemed to abate prior convictions without an express statement of legislative intent. Even if the majority in *Hamm* did dilute the need for an expressed intent, as Mr. Justice Black in dissent vigorously contended it had, 379 U.S. 306, 318; see also 79 *Harv. L. Rev.* 132, 133 (1965), the facts before the court do not fall within even the majority's more lax requirement of imputed intent.

Furthermore, unlike the Civil Rights Act of 1964 which changed the status of defendants' conduct which took place prior to its passage, § 504 had no such effect on Bryson's conduct. No case has held § 9(h) unconstitutional, and, moreover, petitioner was convicted under 18 U.S.C. § 1001.

This court concludes that petitioner's reliance on "abatement" is misplaced. Even if his conviction were not final, as it is, it would not abate on the facts of this case. Hence, the doctrine's applicability to final convictions need not be considered [compare *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964), and *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), with *Massey v. United States,* 291 U.S. 608 (1934)].

(3) *Severity of Sentence*

Petitioner argues that his original sentence was cruel and unusual punishment, though admitting that it was authorized by § 1001, the statute under which he was convicted. Bryson has made the same argument before and it was rejected then as being without merit. *Bryson v. United States,* 265 F. 2d 9 (1959), *cert. denied,* 360 U.S. 919 (1959).

(4) *Standing*

Petitioner contends that § 9(h) was unconstitutional. Respondent strenuously urges that petitioner may not raise the issue, relying on *Dennis v. United States,* 384 U.S. 855, 864-67 (1966). Petitioners in *Dennis* were convicted of conspiring to file false affidavits—the affidavits required by § 9(h). The Court held that the petitioners were without standing to attack a law when convicted of conspiracy to avoid and flout it. The Court said:

> It is the entire conspiracy and not merely the filing of false affidavits, which is the gravamen of the charge. 384 U.S. at 860.
>
> . . .
>
> [P]etitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. . . . [This is a case of] a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction. 384 U.S. at 865.
>
> . . .
>
> The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is

> unconstitutional. This is a prosecution directed at petitioner's fraud. 384 U.S. at 867.
>
> . . .
>
> Because the claimed invalidity of § 9(h) would be no defense to the crime of conspiracy charged in this indictment, we find it unnecessary to reconsider [*American Communications Ass'n v. Douds*, 339 U.S. 382 (1950)]. . . . *Ibid.*

Though the opinion has been criticized, 80 *Harv. L. Rev.* 213 (1966), it states a rule of standing which this court is duty-bound to follow if the rule applies to the case at bar. Petitioner argues that *Dennis* is inapplicable because Bryson is proceeding by way of collateral attack, whereas *Dennis* was a case of direct attack. Petitioner also argues that even if *Dennis* applies to collateral attacks, Bryson's case is distinguishable from *Dennis*.

The court finds that the case of Hugh Bryson is distinguishable from *Dennis*. In *Dennis*, the Court repeatedly stressed the mental state of the petitioners at the time of the commission of their offense. They were "cynical," "fraudulent," and "deliberate." They faked a resignation from the Communist Party. They knew and believed they were lying as to their *membership* in the Party and that they were defrauding the government. In contrast, Bryson has at all times denied the falsity of his affidavit, while in *Dennis*, only the conspiracy was factually challenged. Indeed, Bryson was *acquitted* of falsely swearing he was not a *member* of the Party. His conviction, on the *affiliation* count, turned on a word more ambiguous

than "member", "affiliation" being as much a conclusion or opinion as a fact. *Cf., American Communication v. Douds,* 339 U.S. 382, 420 (Frankfurter, J., concurring). Petitioner observed that at his trial, the jury requested, and was refused, a dictionary to seek help in defining "affiliation". Even the court of appeals in *Bryson* was unable to precisely define the term. 238 F. 2d at 663.

The Court in *Dennis,* as respondent does here, relied on the cases of *Kay v. United States,* 303 U.S. 1 (1938), and *United States v. Kapp,* 302 U.S. 214 (1937). *Kay* refused to allow a defendant to raise the defense of unconstitutionality after a conviction for lying as to facts which would have entitled him to a certain quantity of government bonds. *Kapp* was also a case of factual misrepresentation. In neither *Kay, Kapp* nor *Dennis* was there a false statement which turned on the construction of a word like "affiliated"; in neither *Kay, Kapp* nor *Dennis* did the defendant deny that he had lied. *Bryson* is a different case.

Furthermore, *Dennis* stressed that petitioners in that case had ignored the Court's holding in *Douds* on the constitutionality of § 9(h). 382 U.S. at 865 n. 11, 867. While it may be said that Bryson did a similar act, at least one member of the *Douds* Court questioned whether the terms "membership" and "affiliation" stood on equal constitutional footing. *Cf.,* 339 U.S. 382, 420 n. 2 and accompanying text (Frankfurter, J., concurring).

If *Dennis* stood simply for the proposition that being convicted of violating a statute when a declara-

tory judgment could have been sought had the effect of depriving a defendant of standing to attack the statute, a legion of cases would be overruled. *Dennis* stands for no such proposition. What *Dennis* does say is that when the conduct of the defendant is particularly onerous under the circumstances, he may be held to lack standing to challenge a statute.

Standing is not a rigid concept, *cf., Hobson v. Hansen,* 265 F. Supp. 902, 906 (D.D.C. 1967), and authorities there cited. And well it is not. Long ago it was said that "Rigorous law is often rigorous injustice." Terence, *Heauton Timoroumenos,* Act IV, Sc. 4. The facts surrounding Bryson's conviction have been stressed not for the purpose of rewriting the jury's conclusions, but rather to examine the particular legal and equitable posture of the petitioner before this court. All the court is saying is that it finds Bryson's conduct to be less onerous than that in the *Dennis* case—significantly less so and therefore the rule of *Dennis* does not strip Bryson of standing to attack the constitutionality of § 9(h). Petitioner's contention that *Dennis* is inapplicable to collateral attacks need not, therefore, be considered.

(5) *Section 9(h)*

Although § 9(h) was upheld against constitutional attack in *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950), that decision has been undermined, both as to its free speech and bill of attainder holdings, by more recent pronouncements of the Supreme Court.

Turning first to petitioner's argument that § 9(h) was a bill of attainder. In *United States v. Brown*, 381 U.S. 437 (1965), the Court held unconstitutional § 504, the successor statute to § 9(h). The Court stated its bill of attainder test: A law is unconstitutional as a bill of attainder if it (1) is a legislative act (2) which imposes punishment (3) on an easily ascertainable class (4) without a judicial trial. *Brown* said that *Douds* had misapplied prior cases, 381 U.S. at 457 n 32, 460. It is true that § 9(h) differed from § 504 in that the former permitted an escape from the disability imposed on the union should the officers change their political affiliations. Section 504 provided no escape from criminal sanctions if the officer had been a communist within five years. However, under *Brown's* broad concept of what constitutes "punishment", § 9(h) imposed punishment by depriving union officers of either their jobs or their political beliefs, and consequently amounted to a disability which is punishment. The dissenters in *Brown* were explicit: "[*Douds*] is obviously overruled." 381 U.S. at 464-65.

The Constitution seeks to avoid the evil that inheres when a legislature can punish without a judicial trial offering procedural safeguards and requiring a finding that the specific individual being punished does indeed constitute the danger sought to be prevented. In short, then, bills of attainder are pernicious because legislative classifications may include persons whose conduct is not a danger which may constitutionally be punished. The assumption

of § 9(h) was that all communists were dangerous as union officials. Section 9(h) applied to the most docile communist even though he held no illegal aims. No judicial trial permitted a member or affiliate to show that he was *not* a threat to the national economy. He was automatically swept within the legislative class and punished by administrative sanctions. That is the evil of a bill of attainder. That was the evil of § 9(h). See generally Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 *Calif. L. Rev.* 212, 250-51 (1966).

Doud's holding that the oath did not violate the first amendment has similarly been undermined by subsequent cases. Section 9(h) applied to members or persons affiliated with the Communist Party. To question one merely about his membership or affiliation violates the first amendment. *E.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Scales v. United States*, 367 U.S. 203 (1961); *Herndon v. Lowry*, 301 U.S. 242 (1937); *DeJong v. Oregon*, 299 U.S. 353 (1937); *Hurwitz v. Directors Guild of America, Inc.*, 364 F. 2d 67, 70-76 (2d Cir. 1966). To state the facts of each case just cited is unnecessary. They all teach the same elemental proposition essential to a free democracy: Membership alone in a political party is constitutionally not a fact which can be legitimately proscribed. More than membership is required. "Specific intent" is required—a specific intent or belief

in the illegal purposes of the group. Knowledge of the group's aims is not alone sufficient. Membership or less was deemed enough for a conviction in petitioner's case. 243 F. 2d at 839; 238 F. 2d at 663. The concept now frequently used to describe oaths and statutes which apply regardless of specific intent of the person touched by the law is "overbreadth". That is to say that statutes affecting mere members of political organizations are overbroad in that they punish people who are not a constitutionally punishable danger. Unless a member has an unlawful intent himself, he is not a person who constitutes a clear and present danger to the national security or economy. That is why a statute is said to be overbroad. Guilt by association may not be tolerated in a free society: "[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization . . . or which is not active membership violates constitutional limitations." *Keyishian v. Board of Regents,* 385 U.S. 589, 608 (1967).

(6) *Relief and the Relation Between Section 1001 and Section 9(h)*

Petitioner asserts that if § 9(h) falls as a bill of attainder or as a statute violating his first amendment rights, the conviction under § 1001 must also fall. He contends that § 9(h) expressly referred to §1001 and that the latter is only the procedural means of enforcing § 9(h). Hence, if § 9(h) is void, there is nothing on which §1001 could operate and the trial court was consequently without jurisdiction to im-

pose any punishment. Respondent argues that even if § 9(h) was unconstitutional, § 1001 is not and that there is no right to perjure oneself.

Section 1001, the statute under which Bryson was convicted, proscribed false statements "in any matter within the jurisdiction of any department or agency of the United States. . . ." As that phrase has been consistently construed, petitioner committed no offense because § 9(h) was unconstitutional. Hence, no government agency was authorized to inquire into petitioner's political beliefs, membership or affiliation. Only the "authorized functions" of government were intended to be protected, *United States v. Gilliland*, 312 U.S. 86, 93 (1941). The Ninth Circuit has similarly held: "A false statement is submitted in a matter within the jurisdiction of a department or agency within the meaning of 18 U.S.C.A. § 1001 if it relates to a matter as to which the Department had the power to act." *Ogden v. United States*, 303 F. 2d 724, 743 (9th Cir. 1962), and in *Pitts v. United States*, 263 F. 2d 353, 358 (9th Cir. 1959), the court said "It is clear that the congressional intent in using the broad language found in 18 U.S.C. § 1001 . . . was to protect the authorized functions of governmental departments and agencies. . . ." Cases reaching the conclusion that the non-communist affidavits were within the jurisdiction of the United States are inapposite, as they were decided prior to *United States v. Brown*, 381 U.S. 437 (1965); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and assumed the constitutionality of § 9(h).

Even if the inquiry was within the jurisdiction of the government, petitioner contends that the entire statutory scheme cannot constitutionally be applied if § 9(h) is unconstitutional. The evils of such a scheme were discussed by the Supreme Court in *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1965): "[E]mployees of character and integrity may well forego their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom." The entire scheme of oath and criminal punishment constituted the evil. The dissenters even claimed that the majority had invalidated only the criminal penalty. 384 U.S. at 23. In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), it was made clear that more than the criminal penalty was unconstitutional—the inquiry as to political membership alone constituted an unconstitutional chilling effect on speech when specific intent was not required.

It is no answer to say that because Bryson was not deterred from perjury or yielding his beliefs that he may not contest the statutory scheme. It is well settled doctrine that where first amendment or political rights are involved, hypothetical applications of a statute may be raised and may be determinative. *E.g., Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Thornhill v. Alabama,* 310 U.S. 88 (1940). Nor can it be said that merely because the criminal penalty is in a separate statute from the oath requirement that the perjury conviction must stand. That would be to exalt form over substance—a luxury in which a court

must not indulge when basic constitutional rights are at stake. Section 1001 is expressly invoked by § 9(h). The criminal penalty could just as easily have been incorporated into § 9(h) itself. There is no intent evident that Congress intended § 1001 to be applicable if § 9(h) was declared unconstitutional. *Cf.*, 29 U.S.C. § 144. Since this court holds § 9(h) to have been unconstitutional, its invocation of §1001 was also without effect.

The foregoing constitutes the court's findings of fact and conclusions of law.

Therefore, It Is Hereby Ordered that petitioner's conviction and sentence be, and hereby are, set aside. It Is Further Ordered that he be released from parole and its attendant terms and conditions and that he be relieved of the remaining portion of his fine.

Dated, November 6, 1967.

Alfonso J. Zirpoli
United States District Judge

Filed November 6, 1967,
Clerk of the U. S. District
Court, San Francisco.